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No. 84-1144

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Respondent's brief in opposition completely misses the point of this case. The government does not dispute that forfeiture proceedings are subject to due process and that an individual is entitled to a hearing before his property is forfeited. See Pet. 13 n.10. This adequately protects respondent's property interest in his automobile (see Br. in Opp. 8), and this is the only due process right recognized by this Court in *United States* v. *$8,850 in United States Currency,* 461 U.S. 555 (1983). But remission or mitigation is a discretionary administrative remedy that is wholly distinct from the questions whether the property was properly seized or is forfeitable. This remedy, like commutation of a sentence, is a matter of grace; there is no right to such an administrative remedy, no right of judicial review of the administrative determination, and no reason why the Constitution should be read to require that the remission or

mitigation decision be made within a particular time, much less the extremely short time frame contemplated by the court of appeals. See Pet. 10-15.[1]

2. Respondent relies on *Lee* v. *Thornton,* 538 F.2d 27 (2d Cir. 1976), as establishing a special rule for passengers stranded by the seizure of automobiles at the border. For the reasons stated in our petition, *Lee* is wrongly decided. At any rate, it appears that its rule is being extended well beyond the situation of persons stranded at the border. In this case, it is clear that respondent was not left stranded by the seizure of his automobile (see Pet. 18). More significantly, the Second Circuit, relying on *Lee* and the decision below, has recently extended those cases in a very unsettling way, recognizing the possibility of individual *Bivens* liability for undue delay in processing a petition for remission or mitigation in a situation where the claimant failed to take appropriate action to facilitate the rapid return of his vehicle.

In *Johns* v. *McKinley,* 753 F.2d 1195 (2d Cir. 1985), an individual's truck was seized as forfeitable when he tried to smuggle an alien across the border. Twenty days after the seizure — only a day before the government commenced judicial forfeiture proceedings — Johns filed a petition for remission or mitigation of the forfeiture. Sixty-five days

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[1]Indeed, respondent seems to recognize the unreasonableness of his position when he suggests that Customs "could evolve a procedure for obtaining waivers" to allow the government time adequately to consider remission petitions (Br. in Opp. 9). If the only due process right at stake here is one that the individual will gladly waive, the supposed right cannot be of much real significance. Moreover, if the right is going to be waived in almost all cases, it is apparent that respondent's contention has no broader impact than to allow him to secure the windfall of escaping any penalty at all (and presumably the customs duty as well) for attempting to bring his Jaguar into the country in violation of the customs laws.

later, the government granted the petition in part. The court of appeals reversed the district court's holding that the time taken to act on the petition did not violate due process. The court of appeals ordered the case remanded in order to determine whether a *Bivens* action should lie against the Assistant Attorney General of the Criminal Division for unreasonably delaying action on the petition or against the Commissioner of Immigration and Naturalization for failing to promulgate regulations that would lead to faster action on such petitions.

By adding the specter of individual liability based upon short delays in processing remission and mitigation petitions, both for agency heads and for individuals involved in processing the petitions, the *Johns* decision further encourages government officials to give short shrift to mitigation petitions in the interest of speedy disposition or to curtail severely the availability of the remedy (see Pet. 20-24). If claimants are to retain the benefits of the mitigation remedy, therefore, it is important for the Court to grant certiorari here and reverse the court of appeals' erroneous application of the Due Process Clause.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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